

STATE OF MAINE
SUPREME JUDICIAL COURT
ADDITION OF RULE 11C TO
THE MAINE RULES OF CRIMINAL PROCEDURE

2012 Me. Rules ____

Effective: _____, 2012

All the justices concurring therein, Rule 11C of the Maine Rules of Criminal Procedure is hereby adopted to be effective on the date indicated above. The text of Rule 11C is stated below. To aid in understanding Rule 11C, an Advisory Note appears after its text. The Advisory Note states the reason for recommending the adoption of Rule 11C, but it is not part of Rule 11C adopted by the Court.

1. Rule 11C of the Maine Rules of Criminal Procedure is adopted to read as follows:

**RULE 11C. DUTY OF DEFENSE COUNSEL TO COMMUNICATE TO
THE DEFENDANT A FORMAL OFFER FOR A PLEA AGREEMENT;
DUTY OF COURT.**

(a) **Definition of a Formal Offer.** A formal offer for a plea agreement has definite terms in accordance with Rule 11A(a) and is more than an informal exploration. It should contain the date, event or other circumstance upon which the offer will expire or be cancelled. It may be in writing, but need not be; however, if oral, it must be capable of being stated on the record later in court.

(b) **Duty of Defense Counsel.** A defense counsel who receives from the attorney for the state a formal offer for a plea agreement must promptly communicate that offer to the defendant, and explain to the defendant the meaning of its terms. Defense counsel must memorialize the date of receipt, the communication and explanation.

(c) **Duty of Court.** Prior to the acceptance of an open plea of guilty or nolo contendere or prior to jury selection for a jury trial or the start of a bench trial, the court shall inquire of the attorney for the state whether there was a plea offer, whether formal or informal. If the court determines that a formal plea offer was made it shall inquire of defense counsel whether the formal offer was communicated and explained to the defendant. The court may inquire of defense

counsel what steps defense counsel has taken to memorialize the communication and explanation. The court may ask the defendant his or her understanding of the meaning of the formal plea offer.

Advisory Note - ____ 2012

In *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012), the United States Supreme Court held that defense counsel has a duty under the federal constitution to communicate to the defendant a prosecutor's "formal offer" for a plea agreement. The Court found no occasion to define the term "formal offer" with precision because the prosecutor's offer was clearly "formal"; it was in writing, its terms were clearly and definitely stated and it contained a fixed expiration date (132 S.Ct. at 1404, 1408).

Defining the distinction between a "formal" offer and an "informal" one is a matter of considerable importance. If "formal offer" is defined too broadly, the state's interest in finality may be unduly impaired. There is a risk of "late, frivolous or fabricated claims" (132 S.Ct. at 1408) based on nothing more than informal conversations ("feelers") between the prosecutor and defense counsel. The potential for wasteful litigation is serious (whether it be a repeat trial or a repeat guilty plea) if a plea offer is not communicated.

On the other hand, if "formal offer" is defined too narrowly, the defendant's interest in fair notice of a possible plea agreement may receive insufficient protection.

Thus, the definition of a "formal offer" must strike the appropriate balance between these competing interests.

Obviously, a state rule of procedure cannot govern this issue of federal constitutional law; but it "can be [an] important guide[]" (132 S.Ct. at 1408). Moreover, it may provide more protection to defendants than the federal constitutional minimum or provide clearer guidance to defense counsel.

Subdivision (a). "Formal offer" is defined as an offer having definite terms in accordance with Rule 11A(a) and consisting of more than informal discussions or feelers. Because of the variety of current practices, no requirement of a writing is imposed, but the offer must be capable of being stated on the record later in court. It should contain an expiration date or otherwise state the terms on which it

will or may expire. Of course, the attorney for the state is under no obligation to make an offer of any kind.

Subdivision (b). A duty is imposed on defense counsel to communicate a formal offer to the defendant and to explain the meaning of its terms. Because a dispute may later arise as to what was communicated and explained, defense counsel must memorialize the date of receipt, the communication and explanation.

Subdivision (c). Prior to the acceptance of an open plea of guilty or nolo contendere or prior to jury selection for a jury trial or the start of a bench trial the attorney for the state must reveal to the court the existence of any plea offer, not simply one viewed by the attorney for the state and defense counsel as formal, since ultimately it is the court that must determine whether an offer is formal or informal. If the court determines the offer is formal the court then has the duty to put on the record the existence, communication and explanation of the formal offer. The fundamental aim of this requirement is to make do-overs unnecessary if a formal plea offer is not accepted.

2. The adoption of Rule 11C shall be effective _____, 2012.

Dated:

FOR THE COURT¹

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

¹ This Rule Amendment Order is approved after conference of the Court, all Justices concurring therein.